Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BRADLEY T. RYAN,

Petitioner,

v.

WEXLER & WEXLER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the plaintiff's check, which was presented to a casino for payment and was later returned for insufficient funds, involved a transaction involving mutual assent creating an obligation to pay in the future and is therefore a debt pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.*

PARTIES

The following is a list of all of the parties to the proceedings in the Court of Appeals for the Seventh Circuit:

Plaintiff-Appellant:	Bradley T. Ryan
Defendant-Appellee:	Wexler & Wexler
Parent/Subsidiary Companies:	None

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 113 F.3d 91 (7th Cir. 1997), and is reprinted in the Appendix hereto at page A1. The order of the United States District Court for the Northern District of Illinois is unreported, but is reprinted in the Appendix at A6.

STATEMENT OF JURISDICTION

On June 19, 1997, the District Court entered an order dismissing Plaintiff's Complaint against Defendant. Plaintiff thereafter filed his Notice of Appeal with the Court of Appeals for the Seventh Circuit. Following full briefing on the merits, the Court of Appeals heard oral argument on February 11, 1997. On May 7, 1997, the Court issued a written opinion in which it reversed the District Court and remanded the case for proceedings consistent with its opinion and with the holding of *Bass v. Stolper*, 111 F.3d 1322 (7th Cir. 1997).

Rehearing was not requested, nor was an extension of time to file this Petition for Writ of Certiorari.

This Court, pursuant to 28 U.S.C. §1254(1), has jurisdiction to review the ruling of the Court of Appeals on the petition for writ of certiorari.

Notifications pursuant to Supreme Court Rule 29.4(b) and (c) are not required.

STATUTES AND CONGRESSIONAL AND REGULATORY AUTHORITES INVOLVED

STATUTES

Federal Statutes

Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.*

15 U.S.C. §1692 *Congressional Findings and Declaration of Purpose*

(a) *Abusive Practices*

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

* * * * *

(e) *Purposes*

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. §1692a *Definitions*

As used in this subchapter—

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any

person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditor; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed

or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

15 U.S.C. §1692l(a) *Administrative Enforcement*

(a) Compliance with this subchapter shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another agency under subsection (b) of this section. For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of this subchapter shall be deemed un unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

15 U.S.C. §1692m *Reports to Congress by the Commission*

(a) Not later than one year after the effective date of this subchapter and at one year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this subchapter, including such recommendations as the Commission deems necessary or appropriate. In addition, each report to the Commission shall include its assessment of the extent to which compliance with this subchapter is being achieved and a summary of the enforcement actions taken by the Commission under section 1692l of this title.

(b) In the exercise of its functions under this subchapter, the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 1692l of this title.

Consumer Credit Protection Act, 15 U.S.C. §1601 *et seq.*

15 U.S.C. §1601 *Congressional Findings and Declaration of Purpose*

(a) The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms

available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

* * * * *

Equal Credit Opportunity Act, 15 U.S.C. §1691 *et seq.*

15 U.S.C. §1691a *Definitions; Rules of Construction.*

* * * * *

(D) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its [sic] payment or to purchase property or services and defer payment therefor.

State Statutes

Uniform Commercial Code — Negotiable Instruments, 810 ILCS 5/3-101 *et seq.* (1991)

810 ILCS 5/3-104 Negotiable Instrument

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) is payable on demand or at a definite time; and

(3) does not state any other undertaking or instruction by the person promising or ordering

payment to do any act in addition to the payment of money, by the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of any obligor.

* * * * *

(f) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order."

* * * * *

810 ILCS 5/3-806 Checks or Drafts Not Honored Upon Presentment — Liability of Drawer.

Any person who issues a check or other draft that is not honored upon presentment because the drawer does not have an account with the drawee, or because the drawer does not have sufficient funds in his account, or because the drawer does not have sufficient credit with the drawee, shall be liable in the amount of $25, or for all costs and expenses, including reasonable attorneys' fees, incurred by any person in connection with the collection of the amount for which the check or other draft was written, whichever is greater, and shall be liable for interest upon the amount of the check or other draft at the rate provided in subsection (1) of Section 4 of the Interest Act. Costs and expenses

shall include reasonable costs and expenses incurred in the nonlitigated collection of the check or other draft.

* * * * *

CONGRESSIONAL AND REGULATORY AUTHORITIES

Consumer Credit Protection Act, S. Rep. No. 95-382, 95th Cong., 1st Sess., reprinted in 1977 U.S.C.C.A.N. 1695-1696.

Hearings Before the House of Representatives Subcommittee on Consumer Affairs and Coinage of the Committee on Banking, Finance and Urban Affairs, 102nd Cong., 2nd Sess. (1992).

STATEMENT OF CASE

In 1993, Plaintiff tendered a check to a casino in Illinois which was subsequently dishonored by the bank for lack of sufficient funds. Defendant, acting on behalf of the casino, subsequently filed suit against Plaintiff for collection of the dishonored check and obtained a judgment against Plaintiff in that action.

On March 28, 1996, Ryan filed this action under the Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.* ("FDCPA" or the "Act"), thereby presenting an issue of federal question jurisdiction pursuant to 15 U.S.C. §1692k(d) and 28 U.S.C. §1331. Ryan admitted therein that he had written a bad check to the casino, but nevertheless alleged that Defendant had violated the FDCPA.

On May 21, 1996, Defendant filed a motion to dismiss the Complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(h)(3). On June 19, 1996, the District Court, the Honorable Harry D. Leinenweber presiding, granted Defendant's motion to dismiss. The Court, reasoning that the tender of a check for payment was not an extension of credit, held that the FDCPA was not applicable to the collection of dishonored checks. The Court therefore found that it was without subject matter over the Complaint.

Plaintiff appealed the ruling of the District Court. On February 11, 1997, the Seventh Circuit Court of Appeals heard oral argument and, on May 7, 1997, the Seventh Circuit reversed the decision of the District Court and remanded the case to the District Court. *Ryan v. Wexler*, 113 F.3d 91 (7th Cir. 1997). Relying on the Seventh Circuit's ruling in *Bass v. Stolper*, 111 F.3d 1322 (7th Cir. 1997), which was issued after oral argument in this case, the Seventh Circuit determined that the term "debt", as used in the Act, encompassed dishonored checks and did not require an extension of credit. *Ryan v. Wexler*, 113 F.3d at 93. This Petition then followed.

REASONS FOR GRANTING THE PETITION

Introduction

A difference of opinion currently exists regarding what constitutes a "debt" for purposes of the Fair Debt Collection Practices Act ("FDCPA" or the "Act"), 15 U.S.C. §1692 *et seq.* The issue seems straightforward; however, it is a question which has been addressed by a number of courts and about which there is much disagreement.

The FDCPA was enacted in 1977 "to protect consumers from a host of unfair, harassing and deceptive debt collection practices . . .," Consumer Credit Protection Act, S. Rep. No. 95-382, 95th Cong., 1st Sess., reprinted in 1977 U.S.C.C.A.N 1695-1696, and states as one of its purposes the elimination of such practices. 15 U.S.C. §1692(e).

The Act defines "debt" as follows:

> The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. §1692a(5). The term "consumer" is defined in the Act and very little question exists as to its application:

> The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

15 U.S.C. §1692a(3). Likewise, the issue of whether a debt is for "personal, family, or household purposes" is not a matter of controversy. However, the term "transaction" is undefined in the Act and it is the interpretation

of this term, read in conjunction with "debt", which has led to a difference of opinion as to the application of the Act.

The specific issue which has been raised in recent cases brought under the Act, and which is at issue in this Petition, is whether a dishonored check constitutes a debt. In the district courts, this query has been answered in the negative, *see, e.g., Sarver v. Capital Recovery Associates, Inc.*, 951 F. Supp. 550 (E.D. Pa. 1996), and in the affirmative, *see, e.g., Johnson v. CRA Security Systems,* 963 F. Supp. 859 (N.D. Cal. 1997). In a case of first impression in the Court of Appeals, the Seventh Circuit adopted the latter view, rejecting the argument that the answer hinged on the nature of the underlying transaction. *Bass v. Stolper*, 111 F.3d 1322 (7th Cir. 1997). *Bass* was cited with approval by the Seventh Circuit in the instant case, where the Court reversed the District Court's dismissal for lack of subject matter jurisdiction. *Ryan v. Wexler*, 113 F.3d 91 (7th Cir. 1997). Shortly thereafter, the Ninth Circuit followed suit. *Charles v. Lundgren & Associates, P.C.*, ___ F.3d ___ (9th Cir. 1997).

The Third Circuit, while not specifically holding that a dishonored check is not a debt, did construe the term "transaction" under the FDCPA to require the offer or extension of credit. *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1168-1169 (3rd Cir. 1987). This holding has been cited by a number of courts to support their findings that a dishonored check does not constitute a debt.

With all due respect to the opinions of the Seventh and Ninth Circuits, their interpretation and application of

the term "debt" under the Act is contrary to the purpose of the Act and ignores the reality of many consumer transactions.

A. Interpretation of "Debt" Prior to *Bass v. Stolper*.

In the years leading up to the Court's decisions in *Bass v. Stolper*, 111 F.3d 1322 (7th Cir. 1997), and *Ryan v. Wexler*, 113 F.3d 91 (7th Cir. 1997), the issue of what constitutes a debt for purposes of the Act was raised and discussed in many cases. For example, a dishonored check was held to be a debt under the Act in the following cases: *Johnson v. CRA Security Systems*, 963 F. Supp. 859 (N.D. Cal. 1997); *Ernst v. Riddle*, 964 F. Supp. 213 (M.D. La. 1997); *Narwick v. Wexler*, 901 F. Supp. 1275 (N.D. Ill. 1995); and *In re Scrimpsher*, 17 B.R. 999 (N.D.N.Y. 1982).

In contrast, a dishonored check was explicitly ruled not to constitute a debt under the Act in *Sarver v. Capital Recovery Associates, Inc.*, 951 F. Supp. 550 (E.D. Pa. 1996), *McLean v. Melville Collections*, 1995 WL 646384 (N.D. Ill. 1995), and *Perez v. Slutsky*, 1994 WL 698519 (N.D. Ill. 1994). *See also Cederstrand v. Landberg*, 933 F. Supp. 804, 806 (D. Minn. 1996) (court considered whether dishonored check was a debt under FDCPA and held that "a complaint under the FDCPA which fails to allege an offer or extension of credit fails to state a claim under the FDCPA").

Among other transactions which have been found not to constitute a "debt" under the Act are condominium assessments, *Riter v. Moss & Bloomberg, Ltd.*, 932 F. Supp. 210 (N.D. Ill. 1996); *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995); obligation to pay arising out of

theft of goods, *Shorts v. Palmer*, 155 F.R.D. 172 (S.D. Ohio 1994); illegal receipt of microwave television signals, *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3rd Cir. 1987); per capita tax, *Staub v. Harris*, 626 F.2d 275 (3rd Cir. 1980); child support payments, *Mabe v. G.C. Services, Ltd. Partnership*, 32 F.3d 86 (4th Cir. 1994); *Brown v. Child Support Advocates*, 878 F. Supp. 1451 (D.C. Utah 1994); assessment for monitoring private road, *Nance v. Petty*, 881 F. Supp. 223 (W.D. Va. 1994); and sum owed following erroneous credit to bank account, *Arnold v. Truemper*, 833 F. Supp. 678 (N.D. Ill. 1993). *See also Vosatka v. Wolin-Levin, Inc.*, 1995 WL 443950 (N.D. Ill. 1995) (court dismissed case for lack of subject matter jurisdiction, holding that condominium assessments are not debts under the Act). Recently, the Seventh Circuit, again rejecting *Zimmerman*, concluded that condominium assessments are debts. *Newman v. Boehm, Pearlstein & Bright, Ltd.*, ___ F.3d ___, 1997 WL 375314 (7th Cir. 1997).

In a number of cases involving dishonored checks, the parties did not raise the issue of whether the dishonored check constituted a debt and the court, without so finding, proceeded under the assumption that it did. *See, e.g., Broadnax v. Greene Credit Service*, 106 F.3d 400 (6th Cir. 1997); *Stewart v. Slaughter*, 165 F.R.D. 696 (M.D. Ga. 1996); *Edwards v. National Business Factors, Inc.*, 897 F. Supp. 455 (D. Nev. 1995); *Bukumirovich v. Credit Bureau of Baton Rouge, Inc.*, 155 F.R.D. 146 (M.D. La. 1994); *Holmes v. Telecredit Service Corp.*, 736 F. Supp. 1289 (D. Del. 1990); *Pearce v. Rapid Check Collection, Inc.*, 738 F. Supp. 334 (D. S.D. 1990); *West v. Costen*, 558 F. Supp. 564 (W.D. Va. 1983).

The cases which have held that a dishonored check is a debt under the Act have based their conclusion, at least in part, on the language of the Act itself, finding that the definition of "debt" does not exclude dishonored checks. *See, e.g., Ernst v. Riddle*, 964 F. Supp. 213, 215 (M.D. La. 1997) ("[t]he statutory language does not in any way hint that the method in which the obligation is incurred is determinative or even relevant to the creation of an obligation"). In addition, some have looked to legislative history and commentary in finding that a dishonored check should be so categorized. *See, e.g., Johnson v. CRA Security Systems,* 963 F. Supp. 859, 861 (N.D. Cal. 1997) (court acknowledged difference of opinion as to whether a dishonored check is a debt under the Act but determined that legislative history indicated that a dishonored check should be so construed under the Act).

In *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3rd Cir. 1987), however, the Court addressed the nature of a debt for purposes of the FDCPA and reached a different conclusion:

> We find that the type of transaction which may give rise to a "debt" as defined in the FDCPA, is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, *i.e.*, one involving the offer or extension of credit to a consumer. *Specifically it is a transaction in which a consumer is offered or extended the right to acquire "money, property, insurance, or services" which are "primarily for household purposes" and to defer payment.*

834 F.2d at 1168-1169 (emphasis added). While *Zimmerman* involved the defendant's illegal receipt of microwave television signals, which the court specifically found did

not constitute a debt under the Act, it was cited with approval in *Sarver v. Capital Recovery Associates, Inc.*, 951 F. Supp. 550 (E.D. 1996), where the court held it to be controlling with respect to the applicability of the FDCPA to a dishonored check. While the defendant in *Sarver* argued that the Act did not apply, the plaintiff argued that a dishonored check was a debt under the Act, pointing to both the language of the statute and legislative history.

In rejecting the plaintiff's arguments, the court noted that "[t]he statute, on its face, does not indicate when, or under what circumstances, a 'transaction' gives rise to a 'debt.'" 951 F. Supp. at 552. The court then observed that:

> The tendering of a personal check by the payor is not, *ipso facto*, the extension or offer of credit by the payee. On the contrary, a check is a negotiable instrument under Pennsylvania law, akin to a cash payment, rather than a credit arrangement.

Id. at 553. As the court further noted, a negotiable instrument, by definition, is payable upon demand by the person to whom it is tendered and, "[i]n the absence of conditionality at the time of tender, the negotiable instrument/check is payable immediately as a matter of law—even if not as a matter of fact." *Id.* at 553 n.3.

> There is no allegation in the Complaint that, either at the time of the transaction or subsequently, Rite Aid extended to Plaintiff the opportunity to defer payment on the check. *In the absence of any allegation of conditionality in connection with the negotiable instrument made at the time of tender, Plaintiff's check was not an extension of credit and, hence, not a "debt" within the meaning of the FDCPA.*

Id. at 554 (emphasis added). *See also* Uniform Commercial Code, 810 ILCS §3-104(a) (negotiable instrument defined as "unconditional promise to pay or order to pay a fixed amount of money . . . if it (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder . . .").

B. The Consumer Credit Protection Act and Legislative History Regarding the Fair Debt Collection Practices Act Support the View That Dishonored Checks Are Not Debts Under the FDCPA.

While the Seventh Circuit in *Bass* rejected *Zimmerman's* reliance on the fact that the FDCPA was an amendment to the Consumer Credit Protection Act ("CCPA"), 15 U.S.C. §1601 *et seq.*, it appears that this fact, as well as the fact that other credit-related statutes appear as part of the CCPA, is both relevant and instructive. In addition to the FDCPA, the subchapters of the CCPA include the Truth in Lending Act, 15 U.S.C. §1601-1667e (which includes the Consumer Leasing Act and the Fair Credit Billing Act), Restrictions on Garnishment, 15 U.S.C. §1671-1677, the Fair Credit Reporting Act, 15 U.S.C. §1681-1681t, the Equal Credit Opportunity Act, 15 U.S.C. §1691-1691f, and the Electronic Funds Transfer Act, 15 U.S.C. §1693-1693r.

The express purpose of the CCPA, which was enacted in 1969, was stated as follows:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the *extension of consumer credit* would be strengthened by the informed use of *credit*. The informed use of

> *credit* results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of *credit terms* so that the consumer will be able to compare more readily the various *credit terms* available to him and avoid the uninformed use of *credit*, and to protect the consumer against inaccurate and unfair *credit billing* and *credit card* practices.

15 U.S.C. §1601(a) (emphasis added). The amendments to the CCPA, contained in the subchapters cited above, demonstrate the intention of Congress to further enhance the protection of consumers using or considering the use of credit extended to them.

This view was adopted by the court in *Zimmerman,* which found that the transaction giving rise to a debt in all of these subchapters is one which involves "the offer or extension of credit to a consumer." *Zimmerman,* 834 F.2d at 1168. A check, on the other hand, is a negotiable instrument which, unless it is post-dated, *see, e.g., People v. McLaughlin*, 123 Ill. App. 3d 24, 25, 462 N.E. 2d 875, 876 (5th Dist. 1984) (where parties agree that check will not be presented for payment until a later time, the transaction is essentially an extension of credit to the drawer), does not involve an offer or extension of credit and therefore is presumed to be the same as cash and to provide the same immediate availability to funds as cash. *See, e.g., Metal Marketplace, Inc. v. United Parcel Service, Inc.*, 733 F. Supp. 976, 979 (E.D. Pa. 1990) (certified or cashier's check is regarded and accepted widely in the commercial world as the equivalent of cash).

A review of the transcript of the 1992 *Hearings Before the House of Representatives Subcommittee on Consum-*

er Affairs and Coinage of the Committee on Banking, Finance and Urban Affairs, 102nd Cong., 2nd Sess. (1992) ("Hearing Transcript" or "HT"), is also instructive with respect to the types of transactions which the Act was designed to protect. In introducing the hearings, Chairman Esteban Edward Torres noted that while the FDCPA has succeeded in curbing the debt collection abuses which the Act targets, debt collection complaints are increasing again, thus necessitating examination by the subcommittee as to the reasons why.

During the course of the hearings, the subcommittee heard from, *inter alia*, a victim of debt collector abuse, HT at p. 4, a former debt collector, HT at p. 10, a representative of Public Citizen, HT at p. 15, a representative of the National Consumer Law Center, HT at p. 18, the Associate Director for Credit Practices at the Federal Trade Commission, HT at p. 24, and two experts on the role of consumer debt and its impact on the economy, HT at pp. 39, 41. As the testimony of all of the witnesses makes clear, the debt which consumers have amassed and which is the subject of abusive collection practices is *credit* debt. Indeed, Representative McCandless stated:

> There would seem to be two types of debtors. Those who have the ability to pay their debts, but choose not to, and those who want to pay their debts, but because of events or circumstances, are truly unable to pay.

HT at p. 3. A consumer who pays by check, on the other hand, is neither kind of debtor, as he or she intends to conclude the transaction at the time the check is tendered. No deferment of payments or extension of credit is intended or presumed by either the consumer or the payee. In fact, many merchants accept only cash or

checks for the very reason that they do not want to be in the position of extending credit to consumers.

Moreover, there is a recognition in Congress and among those who are involved in or have had reason to examine the collection industry that failure to pay debts is due, in the majority of cases, to an inability to do so, not an unwillingness to do so.

> Western Union . . . has undertaken a study of the collection industry . . . . Western Union analyzed why consumers were overextended.
>
> Unemployment was the number one reason consumers were overextended. Unemployment was the number one reason consumers gave for past due balances; it was given 53 percent of the time.
>
> Additional reasons included reduced income, other financial obligations, illness, and marital separation. Thus, it becomes understandable why consumers may be temporarily behind in their bills.

HT at p. 17.

Roberts v. WalMart Stores, Inc., 736 F. Supp. 1527 (E.D. Mo. 1990), which was brought pursuant to the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §1691 *et seq.*, is also instructive. Plaintiffs therein purchased items at defendant's store using a personal check. When the defendant's clerk took the check, she noted on the back of it various information, including the race of the plaintiffs. When plaintiffs, who were African-American, discovered this, they returned the merchandise and retrieved their check. They subsequently filed suit under, *inter alia,* the ECOA. Defendant moved to dismiss, alleging that its acceptance of plaintiff's check was not an extension of credit pursuant to the ECOA.

The ECOA provides in relevant part as follows:

> The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its [sic] payment or to purchase property or services and defer payments therefor.

736 F. Supp. at 1529 (citing 15 U.S.C. §1691a(d)). Plaintiffs, in response, argued that accepting payment by check constitutes credit:

> because "the exchange of goods and merchandise for a check issued by a customer creates a valid debit or obligation on the part of the purchaser and defers payment until such time as the check is presented for payment to the debtor's bank and thereafter paid."

Id. The court rejected this argument:

> The Court concludes that the transaction between plaintiffs and defendant fails to meet the definition of "credit" in 15 U.S.C. §1691a(d). Since plaintiffs' check was negotiable upon execution, defendant did not grant plaintiffs any right to purchase merchandise and defer payment for it. Although a delay in payment of the check may be necessary due to technology which does not currently allow for the immediate processing of a check, defendant maintained the right to present the check to the drawee immediately for payment.

Id. at 1529-1530. In dismissing the plaintiffs' ECOA claims, the court stated that "[t]here is no authority for plaintiffs' argument that payment by check, absent an agreement by the seller to hold the check for a period of time before presentment to the drawee, constitutes an extension of credit rather than a cash transaction." *Id.* at 1530.

C. A Reasonable and Proper Interpretation of the FDCPA Would Exclude Dishonored Checks From the Scope of the Act.

Like the term "debt," the term "credit" is undefined in the FDCPA. However, the term "creditor" is defined in the Act:

> The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

15 U.S.C. §1692a(4). Taken on its face, this definition indicates an assumption that the debt is credit-related. While the argument may be made that the term "or to whom a debt is owed" can encompass a dishonored check, an argument which brings one back to the issue of the definition of "debt," a common sense reading of the statute and a common sense consideration of everyday consumer transactions would lead one to the conclusion that a check which is presented in payment for goods and services does not constitute a debt. The fact that the check is not honored upon presentment does not change the character of the check so as to bring it under the Act. While the dishonored check represents a sum which remains outstanding, it is not a "debt" for purposes of the Act. Rather, the payee has recourse under state statutes which impose liability on the drawer of a dishonored negotiable instrument. *See, e.g.,* 810 ILCS 5/3-806 (1991) ("Any person who issues a check or other draft that is not honored upon presentment . . . because the drawer does not have sufficient funds in his account . . . shall be liable in the amount of $25, or for all costs

and expenses, including reasonable attorney's fees, incurred by any person in connection with the collection of the amount for which the check or other draft was written, . . ."). *See also United States v. Boulahanis*, 677 F.2d 586, 590 (7th Cir. 1982) ("The extension of credit is a deliberate act by a creditor[; i]t does not occur merely because a customer defaults"). Likewise, if a consumer pays for goods or services with counterfeit currency, the fact that the currency, like the dishonored check, is useless to the merchant does not convert that currency into a debt under the Act.

While the Act was designed to protect consumers who have engaged in various transactions, it was not meant to be all-inclusive. Rather, it was targeted to the largest area of concern from the perspective of consumer protection: the debt collection practices of companies and individuals hired by those who have extended credit to consumers. A merchant who has accepted a check has not extended credit unless he has accepted a post-dated check. *See, e.g., People v. McLaughlin*, 123 Ill. App. 3d 24, 25, 462 N.E.2d 875, 876 (5th Dist. 1984) (where parties agree that check will be presented for payment at a later date, transaction is essentially an extension of credit to drawer). *See also Engstrom v. Wiley*, 191 F.2d 684, 686 (9th Cir. 1951) (sale and delivery and payment by check constituted cash transaction and no debt created; "[i]f the agreement had been that he should receive his payment even one day in the future, a debt would have been created"). In the absence of such a situation, a transaction consummated by the tender of a check should be treated as though it were consummated by the tender of currency. *See, e.g., Metal Marketplace, Inc. v. United Parcel Service, Inc.*, 733 F. Supp. 976, 979

(E.D. Pa. 1990) ("[C]ashier's check is functional equivalent of cash in the world of commerce"). Should the check be dishonored upon presentment, the consumer will certainly owe money to the merchant. However, in no way does the fact that such amount is outstanding mean that the merchant has extended credit or deferred payment. While the effect or result of such a situation may, in a technical sense, be a deferral of payment, such deferral was clearly not intended or contemplated by the merchant at the time it accepted the check.

D. The *Bass* Dissent Provides the Proper Interpretation of "Debt" Under the FDCPA.

The dissent of Judge William J. Bauer in *Bass v. Stolper*, 111 F.3d 1322 (7th Cir. 1997), is worthy of note as it reaches a conclusion which is not only reasonable but also logical in light of the language of the Act. In his dissenting opinion, Judge Bauer notes that the Act does not mandate the conclusion that a dishonored check is a "debt"; as he observes, "if it did, the opinion could have consisted of a paragraph or two pointing out the mandate." 111 F.3d at 1330. *See also Holmes v. Telecredit Service Corp.*, 736 F. Supp. 1289, 1292 (D. Del. 1990) ("The definitional section of the FDCPA is not a model of clarity"). As Judge Bauer observed:

> No case can be made that would demonstrate that checks given in immediate payment of goods and services are "debts" contemplated by the act or that acceptance of the instrument was either a voluntary assumption of a credit transaction or anything other than an accommodation to the check writer. The seller is simply relying on the warrant implied in the delivery of the check that the writer has funds in the

> institution drawn upon and that the institution will immediately honor the check, when presented, by payment in legal tender. So basic is this concept that Black's Law Dictionary gives both the classic definition of "check" as "[a] draft drawn upon a bank and payable on demand, signed by the maker or drawer, containing an unconditional promise to pay a sum certain in money to the order to the payee" and the equally true definition of "bad check": "A check which is dishonored on presentation for payment because of no, or insufficient, funds or closed bank account. Writing or passing of bad checks is a misdemeanor in most states."

111 F.3d at 1331. In finding that the Court placed "too little weight" on the reasoning of *Zimmerman v. HBO Affiliate Group,* 834 F.2d 1163 (3rd Cir. 1987), Judge Bauer further noted:

> Where a contract of sale is goods-for-money, acceptance of a check is not a consent to receive something less than money; it is a convenience to the maker not to require legal tender. The giving of a bad check for goods or services differs from shoplifting only in degree, not in kind; in either event, it is a theft.

Id. Judge Bauer observed that just as a landlord-tenant relationship cannot be created unless both parties agree, a debtor-creditor relationship also cannot be created without the agreement of both parties. *Id.* at 1332. With respect to the need for such an agreement, Judge Bauer stated:

> I do not think that a purchaser of goods can force a seller to become a creditor by delivering a bad check in payment of goods any more than I believe a seller of goods can force anyone into a position of being a debtor simply by delivering goods he has not agreed to accept. *The relationship of seller-buyer is much*

> *different from creditor-debtor. The former relation can blossom into the latter only when done so by voluntary acts of both parties. When a bad check is delivered for goods or services it creates a debt by tortious conduct, not a debt by contract.*

Id. at 1132 n.4 (emphasis added). As Judge Bauer concluded:

> Absent a debtor-creditor relationship voluntarily assumed there is no "debtor" protected by the FDCPA. The victim is not the deliverer of the bad check; it is the recipient and, if protection is to be provided, it should be to him. The FDCPA, I believe, does not cover bad checks given for goods and services.

Id. at 1132.

The comments and conclusions of Judge Bauer capture, in a way the majority fails to do, the essence of the debtor-creditor and merchant-consumer relationships. The critical issue is one of consent or agreement; there is a substantial difference between a merchant who agrees to defer payment or to extend credit to a consumer and a merchant who accepts a negotiable instrument in payment for goods or services with the expectation that he is receiving *immediate*, and not deferred, payment. The fact that a negotiable instrument, such as a check, may be dishonored is a risk the accepting merchant runs in the course of doing business. However, the fact that the check has been dishonored does not convert it into a debt for purposes of the FDCPA.

CONCLUSION

A conflict currently exists among the circuits as to the application of the FDCPA to transactions in which there has been no extension of credit or deferral of payment. The Third Circuit, in considering the application of the Act to the illegal receipt of microwave television signals, a non-credit transaction, has held that the Act does not apply. *See, also, Bass v. Stolper,* 111 F.3d 1322, 1330 (7th Cir. 1997) (Bauer, J., dissenting) (dishonored checks not "debt" under FDCPA). The Seventh and Ninth Circuits, on the other hand, have concluded that dishonored checks are encompassed within the meaning of "debt" under the Act. *See, e.g., Bass v. Stolper*, 111 F.3d 1322 (7th Cir. 1997), and *Charles v. Lundgren & Associates, P.C.*, ___ F.3d ___, 1997 WL 370884 (9th Cir. 1997). As this issue is one which affects consumers and merchants alike and has a significant effect on the interpretation of the Fair Debt Collection Practices Act, it is one which this Court should decide.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2620

BRADLEY T. RYAN,

Plaintiff-Appellant,

v.

WEXLER & WEXLER,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 1806—**Harry D. Leinenweber**, *Judge.*

ARGUED FEBRUARY 11, 1997—DECIDED MAY 7, 1997

Before COFFEY, MANION, and KANNE, *Circuit Judges.*

MANION, *Circuit Judge.* Bradley Ryan wrote a personal check in June 1993 to Harrah's Casino. The check was returned for insufficient funds. Harrah's assigned the dishonored check to Wexler and Wexler ("Wexler") for collection. According to Ryan's complaint, he settled the collection account in full with Wexler in June 1994. Nevertheless, in April 1995 Wexler filed a "judgment"[1]

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[1] We are unsure what exactly is meant by "judgment" in this context; it is the term used by Ryan in his complaint. In any event it is not important to the issue before this court nor therefore to the resolution of this case.

against Ryan. Ryan alleges that this judgment appeared on both his TRW and Equifax credit reports. Ryan, through his attorney, twice wrote to Wexler disputing the accuracy of the judgment. According to Ryan, the erroneously filed judgment remains on his credit report and has led to several denials of credit as well as to Ryan's termination from his previous employment.

Ryan sued Wexler under the Fair Debt Collection Practices Act ("FDCPA" or "Act"), alleging that it had violated the Act by "communicating evidence of credit information to credit reporting agencies which is incorrect and for failing to communicate that the account is the subject of an ongoing dispute." Wexler challenged the court's jurisdiction over its collection practices, alleging that the FDCPA only covers collection activities related to an extension of credit and does not cover activities related to collecting on a dishonored check. Deciding the issue from the bench, the district court agreed with Wexler and held that "because a check is a present, and not deferred, payment of an obligation . . . the Act does not control in this dispute, and the Court . . . [lacks] subject matter jurisdiction."

The sole issue presented by this case is whether the FDCPA applies to debt collection activities on dishonored checks or is limited to those activities related to an extension of credit. Wexler presents several arguments why coverage extends only to the latter. It argues that "[t]he legislative history of the FDCPA clearly establishes that Congress did not intend it to apply to non-credit transactions." It further argues that because the FDCPA was passed as an amendment to the Consumer Credit Protection Act ("CCPA"), also known as the Truth in Lending Act, we should rely on the stated findings and purpose contained in that statute. As a variation on this argument, Wexler contends that because the FDCPA is contained within Chapter 41 of Title 15 of the United States Code, titled "Consumer Credit Protection," its pro-

visions must be understood only to govern extensions of credit. Finally, Wexler argues that the Third Circuit in *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987), has already determined that the Act applies only to transactions involving an extension of credit.

When this case was argued on February 11, 1997, the issue was one of first impression in this circuit and, arguably, in any circuit. But this is no longer so. In *Bass v. Stolper, et al.*, ___ F.3d ___, No. 96-2113, 1997 WL 189320 (7th Cir. 1997), another panel of this circuit addressed the same issue: whether the FDCPA governs collection activities on a dishonored check. In *Bass*, argued shortly before this case was briefed, the court rejected each of the arguments proffered here by Wexler. Relying on the statute, the court determined that "debt" as used in the Act encompassed dishonored checks and did not require an extension of credit.[2] Because this determination derived from the plain meaning of the statute, reference to its legislative history was unnecessary. Nevertheless, the court analyzed the legislative history to demonstrate that it supported the same conclusion. Given the plain meaning of the Act, the court dismissed as irrelevant its location in the federal code and the fact that it was passed as an amendment to the CCPA, noting that other amendments to the CCPA have resulted in provisions that govern transactions unrelated to the extension

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[2] The court in *Bass* determined that "the plain language of the Act in fact defines 'debt' quite broadly as 'any obligation to pay arising out of a [consumer] transaction.'" ___ F.3d at ___, 1997 WL 189320 at *3. Focussing on "any obligation to pay," the court concluded that a "[a]s long as the transaction creates an obligation to pay, a debt is created." *Id.* at ___, 1997 WL 189320 at *3. "We harbor no doubts that a check evidences the drawer's obligation to pay for the purchases made with the check, and should the check be dishonored, the payment obligation remains." *Id.*

of credit. *See, e.g.*, The Electronic Funds Transfer Act, 15 U.S.C. § 1693-1693r. Finally, the court distinguished and departed from *Zimmerman*, which dealt not with dishonored checks but with theft of services.[3]

Bass v. Stolper establishes the law of this circuit, which is that the FDCPA governs debt collection activities related to dishonored checks. Accordingly, we reverse the district court and remand for proceedings consistent with *Bass* and this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[3] The language in *Zimmerman* could probably be characterized as dicta. Nevertheless, because the decision in *Bass* arguably created a conflict with *Zimmerman*, the opinion was circulated among all judges of this court in regular active service pursuant to Seventh Circuit Rule 40(e). A majority did not favor rehearing *en banc*.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: May 7, 1997

BEFORE: Honorable John L. Coffey, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

No. 96-2620

BRADLEY T. RYAN,

Plaintiff - Appellant

v.

WEXLER & WEXLER,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 1806, Harry D. Leinenweber, Judge

The judgment of the District Court is REVERSED, with costs, and this cause is REMANDED, in accordance with the decision of this court entered on this date.

(1061-110393)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Daniel Francis Konicek
Connelly, Mustes, Palmer & Schroeder
1250 Executive Place
Suite 501
Geneva, IL 60134

Case Number: 1:96-cv-01806

Title: Ryan v. Wexler & Wexler

Assigned Judge: Honorable Harry D. Leinenweber

MINUTE ORDER OF 6/19/96 by Hon. Harry D. Leinenweber: For the reasons stated in open court, defendant's motion to dismiss for lack of subject matter jurisdiction [6-1] is granted. Terminating case Mailed notice

This docket entry was made by the Clerk on June 20, 1996

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

[1]

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRADLEY T. RYAN,	)	
	)	
Plaintiff,	)	Docket No. 96 C 1806
	)	
v.	)	Chicago, Illinois
	)	June 19, 1996
WEXLER & WEXLER,	)	9:00 o'clock a.m.
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
HARRY D. LEINENWEBER

APPEARANCES:

For the Plaintiff: (No appearance.)

For the Defendant: MR. MATTHEW CONNELLY
(Connelly & Schroeder
1250 Executive Place, Suite 501
Geneva, Illinois 60134)

Court Reporter: JAMES W. CHEEK
Official Reporter
UNITED STATES DISTRICT COURT
219 S. Dearborn St. Rm. 1944
CHICAGO, ILLINOIS 60604

[2] THE CLERK: 96 C 1806, Ryan versus Wexler & Wexler.

MR. CONNELLY: Good morning, your Honor. Matt Connelly on behalf of the defendants.

I think there was supposed to be a ruling today from the bench.

THE COURT: Yes. I am going to rule.

Is your opposition here?

MR. CONNELLY: I don't see anyone for the plaintiff.

THE COURT: Well, I will rule, anyway.

Plaintiff Bradley T. Ryan sued defendant Wexler & Wexler for a violation of the Fair Debt Collection Practices Act stemming from an unpaid collection account regarding a check written to Harrah's Casino. Defendant now moves to dismiss the action, claiming that plaintiff's obligation is not a "debt" for purposes of the Act.

Assuming that plaintiff's obligation arose from a gambling expense, and that it therefore was incurred for a "personal purpose," 15 U.S.C., Section 1692(a)(5), the key question is whether a dishonored check is a "debt" under the Act. A "debt" arises out of a "transaction" in which there is an offer or extension of the right to defer payment. Vosatka v. Wolin-Levin, Inc., 1995 WL 443950, at Note *3 (N.D. Ill. Jul. 21, 1995). In McClean v. Melville Collections, 1995 WL 646384 (N.D. Ill. Oct. 25, 1995), the court faced the same issue as in the instant case. It [3] determined that a dishonored check is not a "debt" under the Act, which is based on principles of contractual liability. The court stated: "An exchange of consumer goods in return for a payment by check is not

an offer or extension of credit in which the consumer is permitted to defer payment." It further opined that an action for recovery based on the unpaid check was available under the statutory law of negotiable instruments. Citing 810 ILCS 5/3-806.

The Court finds the analysis in McClean persuasive. Although at the time that defendant commenced collection, it considered plaintiff's obligation an unpaid debt owed to the casino, the focus should actually be on the state of affairs at the time of the underlying transaction. When plaintiff wrote the check to Harrah's Casino, he was paying his obligation right then, not deferring payment or paying on credit.

Because a check is present, and not deferred, payment of an obligation, the Court declines to follow the holdings of other courts that are contrary to McClean. See Keele v Wexler, 1995 WL 549048, at *2-3 (N.D. Ill. Sept. 12, 1995); Narwick v Wexler, 901 F. Supp. 1275, 1281 (N.D. Ill. 1995); Strange v. Wexler, 796 F. Supp. 1117, 1118 (N.D. Ill. 1992).

In sum, the Act does not control in this dispute, [4] and the Court dismisses the action under Fed. R. Civ. P. 12(h)(3) for lack of subject matter jurisdiction. Accordingly, defendant's motion to dismiss is granted.

MR. CONNELLY: Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause.)

CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ James W. Cheek
Official Court Reporter

7-24-96
Date